

**SANITIZED DECISION – DOCKET NO. 06-026 C & 06-027 W – BY R.  
MICHAEL REED, CHIEF ALJ – SUBMITTED for DECISION on APRIL 6, 2006  
– ISSUED on APRIL 7, 2006**

**SYNOPSIS**

**CONSUMERS’ SALES AND SERVICE TAX -- LIABILITY OF CORPORATE OFFICER** -- Under the legislatively approved regulations which became effective on July 15, 1993, a person who is in fact an officer of a corporation is personally liable for the unpaid consumers’ sales and service tax liability of the corporation by virtue of his or her status as an officer with any actual managerial authority, regardless of whether the officer had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether the officer knew of the corporation’s default with respect to its consumers’ sales and service tax obligations. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

Accordingly, a person who, as here, was an officer of a corporation in name only (in one document, the application for a business registration certificate), that is, a person who did not in fact have the responsibility of performing any managerial duties, is not personally liable, under W. Va. Code § 11-15-17 [1978] and the implementing regulations, for an unpaid consumers’ sales and service tax liability of the corporation.

**WITHHOLDING TAX -- LIABILITY FOR “MONEY PENALTY” (TAX) AS A PERSON “REQUIRED” TO COLLECT, ACCOUNT FOR, AND PAY OVER TRUST FUND TAX ON BEHALF OF CORPORATION AND WHO “WILLFULLY” FAILED TO DO SO** -- Under W. Va. Code § 11-10-19(a) [1978], a person is liable, jointly and severally, for a civil “money penalty” (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation if (1) he or she was “required” to collect, account for, and pay over such a trust fund tax on behalf of the corporation and (2) if he or she “willfully” failed truthfully to perform these responsibilities on behalf of the corporation.

A person was “required” to collect, account for and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

The term “willfully” failed truthfully to collect, account for, and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the withholding tax. That is, the person in question, prior to the money penalty tax assessment against him or her, had actual knowledge of the corporation’s default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

Accordingly, a person associated with the corporation is not personally liable for the unpaid withholding tax liability of the corporation if one or both of the two requirements for personal liability is/are lacking. Here, both requirements are lacking.

## **FINAL DECISION**

On November 15, 2005, the Internal Auditing Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a consumers’ sales and service tax assessment against the Petitioner, as (an allegedly) responsible Officer of , “the corporation.” This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 15 of the West Virginia Code. This assessment was for the quarterly periods ended March 31, 1998, through December 31, 1999, for estimated tax of \$, interest, through November 15, 2005, of \$, and additions to tax (for failure to file returns and failure to pay tax) of \$, for a total assessed consumers’ sales and service tax officer liability of \$. Written notice of this assessment was served on the Petitioner on a date not set forth in the record.

Also, on November 15, 2005, the Commissioner (by the Division) issued a withholding tax “money penalty” assessment against the Petitioner, as a person (allegedly) responsible on behalf of the Corporation, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. This assessment was for the quarterly periods ended March 31, 1998, through December 31, 1999, for a “money penalty” (tax, without any interest or additions) and total assessed withholding tax responsible-person liability of \$. Written notice of this assessment was served on the Petitioner on a date not set forth in the record.

Thereafter, by mail postmarked January 10, 2006, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment with respect to each assessment. *See* W. Va. Code §§ 11-10A-8(1) [2002] and 11-10A-9(a)-(b) [2002].

Subsequently, notice of an evidentiary hearing on the petitions was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

Prior to the evidentiary hearing, and with leave of this tribunal, the Petitioner filed amended petitions for reassessment in which the Petitioner raised the issue of whether the applicable statute of limitation bars the assessments. It is not necessary to address this issue because this tribunal has decided these matters in favor of the Petitioner on the issue of whether he is personally liable for the taxes in question.

### **FINDINGS OF FACT**

1. In the application by the corporation for a business registration certificate, the Petitioner was listed by his estranged brother, the corporation's president, as an unspecified officer of the corporation (at a West Virginia address at which the Petitioner has never resided). The Petitioner was not aware of the existence of this corporation until notice of the assessments here was served upon the Petitioner, and he was not aware of his having been listed as an officer of the corporation until, after these assessments were issued and served, one of the Commissioner's revenue agents furnished the Petitioner with a copy of the corporation's application for a business registration certificate.

2. The Petitioner in fact never had any type of managerial authority, whether financial, tax, or otherwise, as an actual officer of the corporation and never was associated in any other way with the corporation.

3. Applying the relevant provisions of the consumers' sales and service tax legislative regulations, discussed below, to the evidence in this matter, the West Virginia Office of Tax Appeals finds that, during the period of the assessments, the Petitioner was an unspecified officer of the corporation in name only, but did not in fact have any managerial authority on behalf of the corporation.

4. Applying withholding tax substantive and procedural law, discussed below, to the evidence in this matter, the West Virginia Office of Tax Appeals finds that (1) the Petitioner has shown that he was not one of the persons "required" to collect, account for, and pay over the withholding tax on behalf of the corporation, and, therefore, finds that (2) the Petitioner has shown that he did not "willfully" fail truthfully to perform any such duties.

## **DISCUSSION**

### Consumers' Sales and Service Tax

With respect to the consumers' sales and service tax, the issue is whether the Petitioner is one of the corporate officers who are personally responsible for all or any portion of the unpaid consumers' sales and service tax liability of the corporation for the time period involved in the assessment of that tax in this matter.

For consumers' sales and service tax purposes, W. Va. Code § 11-15-17 [1978] provides that "[i]f the taxpayer is an association or corporation, the officers thereof shall

be personally liable, jointly and severally, for any default on the part of the association or corporation” with respect to that tax.

Effective on and after July 15, 1993, the consumers’ sales and service tax legislative regulations follow the broad reach of W. Va. Code § 11-15-17 [1978] by basing corporate officer liability for unpaid corporate consumers’ sales and service tax liability upon the corporate officer’s status as a corporate officer, as long as that officer, during the assessment period(s), had any actual managerial authority on behalf of the corporation, that is, he or she was not merely an officer in name only. Under this approach, the precise duties or the breadth of the authority of the officer are not determinative. Also, corporate officer liability for the unpaid corporate consumers’ sales and service tax liability is not dependent upon the corporate officer’s knowledge of the corporation’s default in filing such tax returns or in paying such taxes. The relevant portions of the current consumers’ sales and service tax regulations provide:

Sec. 4a.5. The officers of a corporation or association that are personally liable for consumer[s] sales tax include any president, vice-president, secretary, or treasurer, and any other officers provided in the charter or bylaws of the corporation or association, and any person who is elected or appointed to any position with the authority of an officer, and who perform duties or responsibilities in the management of the corporation. The officers of an association include all members of its governing board and its trustees. A person such as an incorporator, shareholder, member or employee of a corporation or association is not

considered to be an officer subject to a personal liability.

. . . .

Sec. 4a.5.2. An officer may be liable whether or not the officer was under a duty to pay the tax or was responsible for the payment of the tax, for or on behalf of the corporation or association, and whether or not the officer acted willfully, or with the intent to evade the tax or payment thereof.

W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993) (emphasis added). After reviewing these regulations, the Legislature approved them. *See* W.Va. Code § 64-7-6(rr) [1993].

### Withholding Tax

With respect to the withholding tax, the issue is whether the Petitioner is one of the individuals who are personally responsible for all or any portion of the unpaid withholding tax liability of the corporation for the time period involved in the assessment of that tax in this matter.

An employer is liable for withholding taxes withheld from employees' wages but not remitted, W. Va. Code § 11-21-75 [1990], and the withheld-but-not-remitted withholding taxes are trust fund moneys belonging to the West Virginia State Tax Commissioner. W. Va. Code § 11-10-5j [1986].

The West Virginia Tax Procedure and Administration Act, specifically, W. Va. Code § 11-10-19(a) [1978], provides (in relevant part) as follows:

Any person required to collect, account for and pay over any tax

administered under this article, who willfully fails truthfully to account for and pay over such tax, and person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall . . . be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over.

(emphasis added) For purposes of the West Virginia Tax Procedure and Administration Act, a “person” is defined by W. Va. Code § 11-10-4(b) [1979] to include a “corporation . . . and also any officer, employee or member [thereof] . . . who, as such officer, employee or member, is under a duty to perform or is responsible for the performance of an act prescribed by the provisions of this article[.]” The question, then, is which persons are responsible for collecting, accounting for, and paying over a corporation’s withholding tax liabilities.

W. Va. Code § 11-10-19(a) [1978], quoted previously, is derived from and is virtually identical to section 6672(a) of the Internal Revenue Code of 1986 (and its predecessors). *See also* Treas.Reg. § 301. 6672-1 (1986). Therefore, precedents deciding issues under that federal tax provision are very persuasive in deciding the same issues under W. Va. Code § 11-10-19(a) [1978].

Generally, a “person required” to collect, account for, and pay over a withholding tax, for purposes of Internal Revenue Code § 6672(a) -- and, therefore, for purposes of W. Va. Code § 11-10-19(a) [1978] -- is any person who had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, such as deciding which corporate debts, including taxes, would be paid. *See, e.g., O’Connor v.*

*United States*, 956 F.2d 48 (4<sup>th</sup> Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993) (Faber, J.).

Under Internal Revenue Code § 6672(a), and, therefore, under W. Va. Code § 11-10-19(a) [1978], the “willful” failure to prevent or to correct the corporation’s withholding tax default is usually the key element in deciding who is personally liable for that default. In the context of these civil penalty statutes, the term “willful” failure to collect, account for, and pay over a withholding tax does not require a criminal intent, such as an evil motive to defraud. On the other hand, these statutes require more than a negligent failure to collect, account for, and pay over the tax. Instead, the person in question must knowingly or recklessly fail to collect, account for, and pay over the withholding tax. *See, e.g., Turpin v. United States*, 970 F.2d 1344 (4<sup>th</sup> Cir. 1992); *Johnson v. United States*, 833 F. Supp. 579 (S.D. W. Va. 1993).

In addition to the foregoing substantive law, the relevant procedural law is that, in a hearing on a petition for reassessment, the burden of proof is upon the person assessed, to show that the assessment is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 63.1 (Apr. 20, 2003).

## **CONCLUSIONS OF LAW**

1. Under the legislatively approved consumers’ sales and service tax regulations which became effective on July 15, 1993, a person who is in fact an officer of a corporation is personally liable for the unpaid consumers’ sales and service tax liability of the corporation by virtue of his or her status as an officer with any actual managerial



authority, regardless of whether the officer had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation, and regardless of whether the officer knew of the corporation's default with respect to its consumers sales and service tax obligations. *See* W. Va. Code § 11-15-17 [1978] and W. Va. Code St. R. §§ 110-15-4a.5 & 4a.5.2 (July 15, 1993).

2. The Petitioner clearly is not one of the corporate officers who are personally liable for all or any portion of the unpaid consumers' sales and service tax liability of the corporation for the time period involved in the assessment of that tax in this matter.

3. Under W. Va. Code § 11-10-19(a) [1978], a person is liable, jointly and severally, for a civil "money penalty" (tax, excluding interest and additions) for 100% of an unpaid withholding tax obligation of a corporation if (1) if he or she was "required" to collect, account for, and pay over such a trust fund tax on behalf of the corporation and (2) if he or she "willfully" failed truthfully to perform these responsibilities on behalf of the corporation.

4. A person was "required" to collect, account for, and pay over a withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], if he or she, at the time the tax filing and payment were due, had the authority to make or to supervise directly the day-to-day financial decisions on behalf of the corporation.

5. The term "willfully" failed truthfully to collect, account for, and pay over the withholding tax, within the meaning of W. Va. Code § 11-10-19(a) [1978], means that the person in question knowingly or recklessly failed truthfully to collect, account for, and pay over the withholding tax. That is, the person in question, prior to the withholding tax money penalty assessment against him or her, had actual knowledge of

the corporation's default with respect to the withholding tax or recklessly ignored obvious financial facts which, with only a cursory inquiry, would have revealed that default.

6. The Petitioner clearly is not personally liable for the unpaid withholding tax liability of the corporation for the time period involved in the assessment of that tax in this matter.

### **DISPOSITION**

**WHEREFORE**, it is the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the consumers' sales and service tax officer liability assessment issued against the Petitioner for the quarterly periods ended March 31, 1998, through December 31, 1999, for estimated tax of \$, interest of \$, and additions to tax of \$, totaling \$, should be and is hereby **FULLY VACATED**, and no consumers' sales and service tax is due from the Petitioner on behalf of this corporation for the period in question.

It is **ALSO** the **DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the \$ withholding tax money penalty assessment issued against the Petitioner for the same time period should be and is hereby **FULLY VACATED**, and no withholding tax is due from the Petitioner on behalf of this corporation for the period in question.